2007

Communications Between Employers and Their Employees

Workplace Flexibility 2010, Georgetown University Law Center

COMMUNICATIONS BETWEEN EMPLOYERS AND THEIR EMPLOYEES
DOL Topic: J[1]

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION ("RFI") ABOUT COMMUNICATIONS BETWEEN EMPLOYERS AND THEIR EMPLOYEES REGARDING FMLA RIGHTS AND OBLIGATIONS.[2]

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

This memorandum addresses employers' and employees' notice obligations under the FMLA and the way in which communication of this notice has worked in practice. Specifically, the DOL requested information about the manner and extent to which notice is communicated by employers to employees about employees' FMLA rights and employers' notice obligations pursuant to the FMLA. In addition, the DOL has requested information about the communication from employees to their employers of the need for unforeseeable leave.

The statute includes only one explicit notice provision: employers must post a general notice of FMLA coverage for employees.[3] The DOL's regulations, however, include several additional provisions that require employers to provide individualized notice of FMLA eligibility and coverage to employees requesting leave.[4]

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[1] This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), *available at* http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf, primarily in Chapter V.

[2] The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the "Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act," *available at* http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm.

[3] 29 U.S.C. § 2619(a).

[4] *See, e.g.*, 29 C.F.R. § 825.110(d). Reviewing courts have invalidated a number of these regulations concerning notice on the grounds that they are beyond the agency's rulemaking authority.

The DOL sought information on the following topics:

- Employee Awareness of FMLA Rights
- Employer Notice of FMLA Leave Designation / Complying with *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002)
- Employee Notice of Unforeseen Leave

ISSUE: Employee Awareness of FMLA Rights

- **The RFI asked: Are employees aware of their rights and potential remedies under the FMLA?** The RFI stated that employee advocates have highlighted studies demonstrating that large numbers of employees fail to understand their rights under the FMLA. Noting that the FMLA has now been in existence for 14 years, the DOL sought evidence that employees are still unaware of their rights, and asked how to remedy this gap, if it exists.

- **The RFI asked: Are there any language barriers to satisfying the posting requirements that need to be addressed?** Currently, 29 C.F.R § 825.300(c) requires employers with a "significant portion" of employees who do not understand English to post the notice "in a language in which the employees are literate."

ISSUE: Employer Notice of FMLA Leave Designation / Complying With *Ragsdale*

- **The RFI asked: What methods do employers use to inform employees that leave is qualified under the FMLA?** The RFI explained that post-*Ragsdale*, employees are not automatically entitled to FMLA leave beyond the 12 week allotment in the event that an employer fails to designate leave as FMLA-qualifying. The DOL sought information about methods used by employers to inform employees that their leaves have been designated as FMLA-qualifying and will be counted against their total FMLA-leave allotments. The RFI also solicited suggestions for improving the system that keeps employees informed about their FMLA-leave allotment.

- **The RFI asked: What changes are needed to ensure that employers promptly designate leave as covered by the FMLA?** How can the DOL both comply with the *Ragsdale* decision and ensure that employers promptly and appropriately designate leave as covered by the FMLA? Part I of the RFI cited several cases invalidating the DOL's blanket penalty provisions for an employer's failure to provide prompt or accurate FMLA designations. The bullet points below set forth the cases cited in the RFI.

    - *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). The Supreme

ISSUE: Employer Notice of FMLA Leave Designation / Complying With *Ragsdale*

Court invalidated the provision in 29 C.F.R. § 825.700(a) that automatically awarded employees additional FMLA leave beyond the 12 week statutory entitlement because of an employer's failure to designate leave as FMLA-qualified. The Supreme Court held that the regulation was beyond the scope of the DOL's authority since Congress had established only a 12 week entitlement in the statute.

- *Woodford v. Community Action of Greene County, Inc.*, 268 F.3d 51 (2nd Cir. 2001). The court invalidated the provision in 29 C.F.R. § 825.110(d) that barred an employer from challenging an employee's eligibility after it was initially confirmed by the employer. The court held that a regulation may not alter the statutory requirements for leave.

- *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000). The court invalidated the provision in 29 C.F.R. § 825.110(d) that deemed an employee eligible for leave if the employer failed to advise the employee of eligibility before leave began. The court held that the DOL cannot confer FMLA rights upon ineligible employees via regulation.

- *Brungart v. Bellsouth Telecomm., Inc.*, 231 F.3d 791 (11th Cir. 2000). The court invalidated the provision in 29 C.F.R. § 825.110(d) that deemed an employee eligible for leave where the employer failed to notify the employee of eligibility within two business days. The court held that the DOL regulation is invalid to the extent it extends eligibility to an otherwise ineligible employee.

ISSUE: Employee Notice of Unforeseen Leave

- **The RFI asked: How often do employees fail to promptly notify their employers of unforeseeable FMLA leave? What proposals exist to remedy this failure?** The RFI noted that employers report that employees do not provide advanced notice of unscheduled intermittent leave.

EMPLOYER-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

EMPLOYER-SIDE COMMENTS

- **Employee Awareness of FMLA Rights**

    - A few comments state that employee awareness of FMLA rights need not be addressed by the DOL because, in these commenters' experience, employees are aware of their FMLA rights. At least one comment notes that this is especially true for unionized employees whose unions "routinely" educate members on the FMLA. Some comments identify abuse of intermittent leave as evidence that employees understand the intricacies of the law. Many commenters suggest that employees should bear the burden of providing adequate information to notify their employers that the employers' FMLA obligations are triggered.

- **Employers' Obligations to Provide Notice of FMLA Leave Designation**

    - Employers report that the current notice regulations are confusing and ineffective. The FMLA designation regulations, which require that an employer designate leave as FMLA-qualifying within two days of receiving a *request* for leave, are described as particularly frustrating. Employers state that they should not be penalized for failing to timely or properly designate leave as long as the employees have received the FMLA's substantive benefits.

    - Employers state that "as much notice as is practicable" – the language in 29 U.S.C. § 2612(e) – is not well-defined, and the implementing regulations, particularly for unscheduled leave, cause significant problems by requiring employers to determine when notice given by an employee is adequate. Employers state that employees should not have up to 48 hours after they return to work in which to notify their employers of the need for FMLA leave. Moreover, employers report that they are not given enough information to determine when an employee first learned of the need for leave, and thus when an employee's 48 hours have begun to run.

    - Employers' Suggested Changes: (1) Revise § 825.301 to give employers either 10 or 15 days after receiving an employee's medical certification to designate leave as FMLA-qualifying and to start counting from the date on which employers receive sufficient information from the employee to determine whether leave is protected; (2) revise §825.302 to require advance notice except in truly unforeseeable situations such as medical emergencies; otherwise, "as soon as practicable" should be given its literal meaning; (3) eliminate § 825.700(a) and the "deeming" provisions of § 825.110 and § 825.208; (4) grant employers the authority to retroactively designate leave as FMLA-qualifying. In addition, one commenter suggested that the DOL adopt a uniform notification letter to be sent during the 10th week that informs employees of the employment

EMPLOYER-SIDE COMMENTS

consequences of not returning to work after the 12 weeks of FMLA leave has been exhausted.

- **Employees' Obligations to Provide Notice of Unforeseen Leave**

  - Many commenters complain that employees do not provide adequate notice of unscheduled leave, particularly intermittent leave. They state that employees do not follow the "as soon as practicable" standard because of the 2-day allowance provisions of §§ 825.302 and 825.303, which employers believe employees rely on to justify giving notice 2 days after their return to work, rather than giving notice when they learn that they will need to take leave.

  - Employers report that the notice provisions of §§ 825.302(d) and .303 have undercut employers' ability to enforce their usual call-in and absence control policies. Employers report that their internal call-in procedures are designed to facilitate normal business operations, not to thwart the exercise of FMLA rights. Employers also emphasize that call-in procedures are essential for scheduling and normal business operations. Employers state that FMLA regulations should not prevent employers from enforcing call-in procedures that are necessary to the normal operation of their businesses.

  - Employers report that when notice of the need for FMLA leave is given to a front-line supervisor only, such notice is inadequate for employers to make a determination of whether FMLA leave is being requested and/or whether the absence is FMLA-qualifying.

  - Employers' Suggested Changes: (1) Clarify that § 825.208(e)(1) does not eliminate an employee's duty to provide advance notice "as soon as practicable" under §§ 825.302 and .303; and (2) specify what information an employee is required to give to put an employer on notice that the leave requested is FMLA-qualifying.[5] A few commenters suggest requiring employees to notify the individual or unit within an employer that is responsible for administering the FMLA to be proper notice.

[5] The Society of Human Resource Management ("SHRM") suggests notification that includes a request for "a leave of absence," "unpaid leave," "unpaid time off," or "FMLA leave" such that a reasonable supervisor would recognize request for FMLA leave.

EMPLOYEE-SIDE COMMENTS

Most employee-side comments on this topic are from organizations, including the National Partnership for Women and Families ("Partnership"), which filed comments on behalf of 91 organizations. However, the majority of employee-side comments were made by individuals who did not address this topic. Each bold-faced heading below sets forth a particular subject of commentary from employee organizations, and is followed by explanatory text describing the comments about this subject in more detail.

- **Employee Awareness of FMLA Rights**

    - Employee organizations state that employers should be obligated to provide adequate information to employees regarding their rights and responsibilities under the FMLA. According to the 2000 Westat Study, many employees do not fully understand their FMLA rights. Accordingly, the DOL should significantly increase efforts to educate employees about their FMLA rights.

    - The Partnership suggests the following outreach efforts for the DOL: (1) conduct a public education campaign about the FMLA and its protections geared toward both employees and employers; (b) develop up-to-date, user-friendly materials about FMLA rights that can be posted and widely distributed; (c) use online tools to provide interactive opportunities to learn about the FMLA; and (d) conduct outreach to stakeholders to distribute educational materials about the FMLA.

    - One commenter suggests that the DOL should require employees to receive notice during the hiring process and annually thereafter, similar to the notice provisions required under the WARN Act. The DOL should also create a model notice for this purpose.

- **Employer Notice of FMLA Leave Designation**

    - Employee organizations state that the two-day time frame in 29 C.F.R. § 825.302(e) is reasonable given the minimal time and resources employers spend reviewing and requesting medical certification (estimated by WorldatWork to be between 30 and 120 minutes per request).

    - Some commenters report that employers face no meaningful penalty for failing to provide notice of FMLA rights or FMLA leave designation. They note that *Ragsdale* does not bar the DOL from imposing *any* penalties on employers for failing to timely notify employees of their rights – it merely barred one specific remedy.

    - The Partnership suggests that the DOL study the frequency and types of problems that employees face when seeking FMLA information from their employers.

EMPLOYEE-SIDE COMMENTS

- Employees' Suggested Changes: (1) Create new penalties for employer non-compliance that are not automatic, but can be imposed after a complaint by an employee and an independent determination of the harm caused by the employer's violation; (2) emphasize that the Supreme Court's decision in *Ragsdale* did not alter an employer's obligations to designate leave promptly as FMLA or non-FMLA qualifying, and to promptly notify employees of the designation; (3) reaffirm and strengthen current provisions that require employers to keep accurate and complete records of how leave has been designated, and when the employee was notified of the designation; and (4) prohibit employers from changing a leave designation retroactively without notifying and consulting with the employee, and require documentation of such notification and consultation.

- **Employee Notice of Unforeseeable Leave**

  - The Partnership argues that the DOL lacks adequate data about the use of unforeseen leave. It notes that unexpected leave is, by definition, unplanned, and would therefore necessitate short notice.

  - Employees' Suggested Change: The DOL should study the use of unscheduled leave before proposing any additional regulations in this area.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC J HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTES

29 U.S.C. § 2611(2)

Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2612(e)

Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee—

> (A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and
> (B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

29 U.S.C. § 2619

(a) In general

> Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

> Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

REGULATIONS

29 C.F.R. § 825.110(d)

The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences.

If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. **If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility.** In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., **two business days absent extenuating circumstances**) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. **If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible.** The employer may not, then, deny the leave. **Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.**

29 C.F.R. § 825.208

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. . . .

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

> (1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.
>
> (2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation,

and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

29 C.F.R. § 825.300

(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any "eligible" employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text.

(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

(c) Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.

29 C.F.R. § 825.301

. . . .(b) (1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see § 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see § 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§ 825.214 and 825.604); and,

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee' unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The specific notice may include other information-- e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee--within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-months period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See § 825.305(a).)

(d) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

. . .

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

29 C.F.R. § 825.302

(a) **An employee must provide the employer at least 30 days advance notice** before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. **If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable**…

(b) **"As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.** For foreseeable leave where it is not possible to give as much as 30 days notice, **"as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known** to the employee…

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see § 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

(e) When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable attempt to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the

employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

29 C.F.R. § 825.303(a)

When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. . .

29 C.F.R. § 825.700(a)

. . . . If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI[6]

Cases

- *Phillips v. Quebecor World RAI, Inc.*, 450 F.3d 308 (7th Cir. 2006).
- *Callison v. City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005).
- *Beaver v. RGIS Inventory Specialists, Inc.*, 144 Fed. Appx. 452 (6th Cir. 2005).
- *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005).
- *Walton v. Ford Motor Co.,* 424 F.3d 481 (6th Cir. 2005).
- *Electrolux Home Prods. v. United Auto. Aerospace & Agric. Implement Workers of Am.*, 416 F.3d 848 (8th Cir. 2005).
- *Woods v. Daimler-Chrysler Corp.*, 409 F.3d 984 (8th Cir. 2005).
- *Crux v. Publix Super Markets, Inc.*, 428 F.3d 1379 (11th Cir. 2005).
- *Brennerman v. MedCentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004).
- *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135 (3rd Cir. 2004).
- *Fogleman v. Greater Hazleton Health Alliance*, No. 03-4413, 2004 U.S. App. LEXIS 26861 (3d Cir. Dec. 23, 2004).
- *Aubuchon v. Knauf Fiberglass*, 359 F.3d 950 (7th Cir. 2004).
- *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003).
- *Lewis v. Holsum of Ft. Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2003).
- *Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir. 2003).
- *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, No. 00-2389, 2002 U.S. App. LEXIS 8853 (3d Cir. Apr. 19, 2002).
- *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002).
- *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002).
- *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001).
- *Holmes v. The Boeing Co.*, No. 98-3056, 1999 WL 9760 (10th Cir. Jan. 12, 1999).
- *Bailey v. Amsted Indus. Inc.*, 172 F.3d 1041 (8th Cir. 1999).
- *Satterfield v. Wal-Mart Stores, Inc.,* 135 F.3d 973 (5th Cir. 1998).
- *Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998).
- *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997).

[6] Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.

Cases

- *Gay v. Gilman Paper Co.*, 125 F.3d 1432 (11th Cir. 1997).
- *Lozano v. Kay Mfg. Co.*, No. 04 C 2784, 2006 WL 1083998 (N.D. Ill. Mar. 28, 2006).
- *Brown v. Dollar Gen. Stores, Ltd.*, No. 1:04CV-107-M, 2006 U.S. Dist. LEXIS 6746 (W.D. Ky. Feb. 21, 2006).
- *Sechrist v. Harris Steel Co.*, No. 03 C 6197, 2005 U.S. Dist. LEXIS 30161 (N.D. Ill. Nov. 30, 2005).
- *Sims v. Schultz*, 305 F. Supp. 2d 838 (N.D. Ill. 2004).
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